IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY L. MADDOX,	§	
	§	
Defendant Below-Appellant,	§	No. 572, 2008
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr. ID 0802028998
Plaintiff Below-Appellee.	§	
	§	

Submitted: June 5, 2009
Decided: July 30, 2009

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 30th day of July 2009, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) A Superior Court jury convicted the defendant-appellant, Gary L. Maddox (Maddox), of attempted first degree robbery and attempted theft. The Superior Court sentenced Maddox to a total period of twenty-six years at Level V incarceration, to be suspended after serving eleven years for ten years of probation. This is Maddox's direct appeal.

(2) Maddox's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Maddox's counsel asserts that, based upon

a complete and careful examination of the record, there are no arguably appealable issues. By letter, Maddox's attorney informed him of the provisions of Rule 26(c) and provided Maddox with a copy of the motion to withdraw and the accompanying brief. Maddox also was informed of his right to supplement his attorney's presentation. Maddox has raised several issues for this Court's consideration. The State has responded to Maddox's arguments, as well as to the position taken by Maddox's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[1]

(4) The testimony at trial reflected that Mohamhad Yousef was working outside of his son's store, the Super Soda Center, on February 6, 2008 when he was approached by a man who placed a gun in his side and twice asked, "Where's the money?" Yousef ran screaming into an adjoining

[1]*Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

business. Meanwhile, the perpetrator opened the front door of the Super Soda Center and yelled to Sean Yousef, who was standing behind the cash register, "Where is the money? Give me the money!" Sean Yousef called 911, and the man ran away. The police arrested Maddox for the attempted robbery on February 23, 2008 after a citizen identified him from a surveillance photograph of the perpetrator that was published in a local newspaper. Upon his arrest, Maddox admitted that he had been at the Super Soda Center on February 6, the night of the attempted robbery. Maddox testified at trial, however, that he was there with his then-girlfriend to buy lottery tickets, a statement that was rebutted by the testimony of the girlfriend at trial. Sean Yousef identified Maddox as the perpetrator at trial, although his father could not. The jury found Maddox guilty of the attempted first degree robbery of Mohamhad Yousef and attempted theft, as a lesser included offense of attempted second degree robbery, with respect to Sean Yousef. The jury found Maddox not guilty of two counts of possession of a firearm during the commission of a felony and one count of possession of a firearm by a person prohibited.

(5) Maddox has raised six issues in his response to his counsel's motion to withdraw. First, he contends that the Superior Court erred in only admitting part of the statement that Maddox made to police at the time of his

arrest. Second, he argues that the first count of the indictment was constitutionally defective. Third, he argues that the evidence was insufficient to sustain his convictions. Fourth, he contends that a ruling by the Superior Court denied him the effective assistance of legal counsel. Fifth, he contends that the prosecutor engaged in misconduct. Finally, he argues that the trial court committed plain error in failing to instruct the jury on the "display" element of the attempted robbery charge. We address these claims in order.

(6) Maddox first argues that it was error for the Superior Court to admit only the inculpatory part of the statement he made to police upon his arrest without admitting the entirety of his statement. Maddox did not raise this objection at trial. Accordingly, we review it on appeal for plain error.[2] The trial judge admitted Maddox's statement that he was at the Super Soda Center on February 6 because it was a statement against interest by a party-opponent, which is not hearsay under the Delaware Rules of Evidence.[3] The exculpatory portion of Maddox's statement did not fall within any exception

[2] Del. Supr. Ct. R. 8.

[3] Del. R. Evid. 801(d)(2)(A).

to the hearsay rule.[4] Accordingly, we find no merit to Maddox's first argument.

(7) Maddox next contends that the indictment charging him with attempted first degree robbery was constitutionally defective because it did not include the term "displayed" what appeared to be a deadly weapon.[5] The indictment, however, specifically identified 11 Del. C. § 831(a)(2) as the crime Maddox was charged with committing and included the name of the offense. This Court previously has held that an indictment containing the official citation to the statute and the name of the offense was sufficient information to put a defendant on notice of the crime with which he was charged even though an element of the crime was omitted from the indictment.[6] We conclude that the indictment in this case provided full notice to Maddox of what he was called upon to defend. Accordingly, we reject Maddox's second argument on appeal.

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[4] *See Smith v. State*, 669 A.2d 1, 4 (Del. 1995) (defendant has no right to admit self-serving statements in his defense).

[5] Count I of the indictment charged Attempted Robbery in the First Degree: "Gary L. Maddox, on or about the 6th day of February, 2008, in the County of Sussex, State of Delaware, did intentionally engage in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct planned to culminate in the commission of Robbery in the First Degree, as defined by 11 Del. C. § 832(a)(2) to wit: when attempting to commit theft he threatened the use of immediate force upon Mohamhad Yousaf [with] what appeared to be a deadly weapon, a handgun, in violation of Title 11, §531(2) of the Delaware Code."

[6] *Malloy v. State*, 462 A.2d 1088, 1092-93 (Del. 1983).

(8) Maddox next argues that the evidence was insufficient to support his conviction for attempted first degree robbery of Mohamhad Yousef because the State's evidence only established that the perpetrator asked Yousef where the money was but did not demand it. In reviewing a claim of insufficient evidence, this Court, viewing the evidence in the light most favorable to the State, must determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt.[7] In this case, the jury was free to consider Mohamhad Yousef's testimony that the perpetrator held a gun to his side while asking him where the money was, and to determine that, under the circumstances, the perpetrator was making a demand for money, regardless of the actual language he used. Under the circumstances, we find the evidence of attempted first degree robbery to be sufficient beyond a reasonable doubt. Accordingly, we reject Maddox's third claim on appeal.

(9) Maddox's fourth argument is that the trial judge denied him the right to the effective assistance of counsel by failing to lift a ban on communication between Maddox and his counsel, which the judge imposed during a break in Maddox's testimony. Maddox argues that the continuing ban on communication between counsel and client prevented him from

[7] *Farmer v. State*, 844 A.2d 297, 300 (Del. 2004).

pointing out to his counsel that no "demand" for money was ever made to Mohamhad Yousef. We reject this claim for several reasons. First, it is clear from the judge's statement that the ban on communication between Maddox and his counsel was in effect only during the break taken while Maddox was in the middle of testifying and was not intended to extend beyond Maddox's time on the stand.[8] Moreover, we have already concluded that the point Maddox wished to communicate to his counsel had no legal merit. Therefore, to the extent the judge's ban could have been misinterpreted by Maddox to extend beyond his cross-examination, we find that Maddox suffered no prejudice. Accordingly, we reject this fourth claim on appeal.

(10) Maddox next alleges that the prosecutor engaged in misconduct by misrepresenting facts during closing arguments. Specifically, Maddox asserts that, with respect to Mohamhad Yousef's testimony, the prosecutor incorrectly stated that Yousef testified the perpetrator said, "Give me the money." We review this claim for plain error because Maddox did not raise this argument below.[9] Under the plain error standard, the error complained

[8] The judge told Maddox, "Mr. Maddox, your lawyer is aware of the rules. You can't communicate with your lawyer at this point during this break because you are in the middle of cross-examination and that is not permitted."

[9] *Hardy* . *State*, 962 A.2d 244, 247 (Del. 2008).

of must be so clearly prejudicial as to jeopardize the integrity of the trial.[10] Even if we assume error in the prosecutor's statement of the facts in this case, however, the error did not jeopardize the outcome of the trial for the reasons we have already explained. Regardless of the specific language he used, the evidence was sufficient for the jury to conclude that Maddox made a demand for money. Accordingly, we reject Maddox's fifth claim on appeal.

(11) Finally, Maddox contends that the Superior Court failed to adequately instruct the jury on the "display" element of attempted first degree robbery. We disagree. The trial judge instructed the jury as follows:

> Count 1 of the indictment alleges attempted robbery in the first degree: Gary L. Maddox, on or about the 6th day of February, 2008, in the County of Sussex, State of Delaware did intentionally engage in conduct, which, under the circumstances as he believed them to be, constituted a substantial step in the course of conduct planned to culminate in the commission of robbery in the first degree, as defined by 11 Del. C. § 832, to wit: When attempting to commit theft, he threatened the use of immediate force upon Mohamhad Yousef with what appeared to be a deadly weapon, a handgun, in violation of Title 11, Section 531(2).
>
> The pertinent definition of robbery in the first degree in the Criminal Code is as follows: A person is guilty of robbery in the first degree when he commits the crime of robbery in the second degree and when, in the course of the commission of the crime, he displays what appears to be a deadly weapon.

[10] *Id.*

In response to a question from the jury during its deliberations, the trial judge further instructed the jury that, "On the robbery one, the charge is displaying what appeared to be a gun. It does not have to be a gun. If it looked like a gun and he displays it, and the perception was that it was a gun from the complaining witness, he can be found guilty of attempted robbery in the first degree." Accordingly, Maddox's assertion that the Superior Court "failed to instruct the jury on the 'display' element at all" is contradicted by the record. The instruction, as given, sufficiently explained the elements of first degree robbery that the victim must subjectively believe the defendant had a weapon and that the defendant's threat was accompanied by an objective manifestation of what appeared to a weapon.[11] Consequently, we reject Maddox's final argument on appeal.

(12) This Court has reviewed the record carefully and has concluded that Maddox's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Maddox's counsel has made a conscientious effort to examine the record and the law and has properly determined that Maddox could not raise a meritorious claim in this appeal.

[11] *See Walton v. State*, 821 A.2d 871, 874 (Del. 2003).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs
Justice